

(ii) A conditional resident or former conditional resident who has not departed the United States after termination of resident status may apply for the waiver. The conditional resident may apply for the waiver regardless of his or her present marital status. The conditional resident may still be residing with the citizen or permanent resident spouse, or may be divorced or separated.

(iii) Evidence of physical abuse may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel. The Service must be satisfied with the credibility of the sources of documentation submitted in support of the application.

(iv) The Service is not in a position to evaluate testimony regarding a claim of extreme mental cruelty provided by unlicensed or untrained individuals. Therefore, all waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the Service as an expert in the field. An evaluation which was obtained in the course of the divorce proceedings may be submitted if it was provided by a professional recognized by the Service as an expert in the field.

(v) The evaluation must contain the professional's full name, professional address and license number. It must also identify the licensing, certifying, or registering authority. The Service retains the right to verify the professional's license.

(vi) The Service's decision on extreme mental cruelty waivers will be based upon the evaluation of the recognized professional. The Service reserves the right to request additional evaluations from expert witnesses chosen by the Service. Requests for additional evaluations must be authorized by the Assistant Regional Commissioner for Adjudications.

(vii) Licensed clinical social workers, psychologists, and psychiatrists are professionals recognized by the Service for the purpose of this section. A clinical social worker who is not licensed only because the state in which he or she practices does not provide for licensing will be considered a licensed

professional recognized by the Service if he or she is included in the Register of Clinical Social Workers published by the National Association of Social Workers or is certified by the American Board of Examiners in Clinical Social Work.

(viii) As directed by the statute, the information contained in the application and supporting documents shall not be released without a court order or the written consent of the applicant; or, in the case of a child, the written consent of the parent or legal guardian who filed the waiver application on the child's behalf. Information may be released only to the applicant, his or her authorized representative, an officer of the Department of Justice, or any federal or State law enforcement agency. Any information provided under this part may be used for the purposes of enforcement of the Act or in any criminal proceeding.

(f) *Decision.* The director shall provide the alien with written notice of the decision on the application for waiver. If the decision is adverse, the director shall advise the alien of the reasons therefor, notify the alien of the termination of his or her permanent residence status, instruct the alien to surrender any Permanent Resident Card issued by the Service and issue a notice to appear placing the alien in removal proceedings. No appeal shall lie from the decision of the director; however, the alien may seek review of such decision in removal proceedings.

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**§ 1216.6 Petition by entrepreneur to remove conditional basis of lawful permanent resident status.**

(a) *Filing the petition.*—(1) *General procedures.* A petition to remove the conditional basis of the permanent resident status of an alien accorded conditional permanent residence pursuant to section 203(b)(5) of the Act must be filed by the alien entrepreneur on Form I-829, Petition by Entrepreneur to Remove Conditions. The alien entrepreneur must file Form I-829 within the 90-day period preceding the second anniversary of his or her admission to

the United States as a conditional permanent resident. Before Form I-829 may be considered as properly filed, it must be accompanied by the fee required under §103.7(b)(1) of 8 CFR chapter I, and by documentation as described in paragraph (a)(4) of this section, and it must be properly signed by the alien. Upon receipt of a properly filed Form I-829, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition. The entrepreneur's spouse and children should be included in the petition to remove conditions. Children who have reached the age of twenty-one or who have married during the period of conditional permanent residence and the former spouse of an entrepreneur, who was divorced from the entrepreneur during the period of conditional permanent residence, may be included in the alien entrepreneur's petition or may file a separate petition.

(2) *Jurisdiction.* Form I-829 must be filed with the regional service center having jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States.

(3) *Physical presence at time of filing.* A petition may be filed regardless of whether the alien is physically present in the United States. However, if the alien is outside the United States at the time of filing, he or she must return to the United States, with his or her spouse and children, if necessary, to comply with the interview requirements contained in the Act. Once the petition has been properly filed, the alien may travel outside the United States and return if in possession of documentation as set forth in §1211.1(b)(1) of this chapter, provided the alien complies with the interview requirements described in paragraph (b) of this section. An alien who is not physically present in the United States during the filing period but subsequently applies for admission to the United States shall be processed in accordance with §1235.11 of this chapter.

(4) *Documentation.* The petition for removal of conditions must be accompanied by the following evidence:

(i) Evidence that a commercial enterprise was established by the alien.

Such evidence may include, but is not limited to, Federal income tax returns;

(ii) Evidence that the alien invested or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement or other probative evidence; and

(iii) Evidence that the alien sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence. Such evidence may include, but is not limited to, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.

(iv) Evidence that the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. Such evidence may include payroll records, relevant tax documents, and Forms I-9.

(5) *Termination of status for failure to file petition.* Failure to properly file Form I-829 within the 90-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the alien's permanent resident status and the initiation of deportation proceedings. The director shall send a written notice of termination and an order to show cause to an alien entrepreneur who fails to timely file a petition for removal of conditions. No appeal shall lie from this decision; however, the alien may request a review of

the determination during deportation proceedings. In deportation proceedings, the burden of proof shall rest with the alien to show by a preponderance of the evidence that he or she complied with the requirement to file the petition within the designated period. The director may deem the petition to have been filed prior to the second anniversary of the alien's obtaining conditional permanent resident status and accept and consider a late petition if the alien demonstrates to the director's satisfaction that failure to file a timely petition was for good cause and due to extenuating circumstances. If the late petition is filed prior to jurisdiction vesting with the immigration judge in deportation proceedings and the director excuses the late filing and approves the petition, he or she shall restore the alien's permanent resident status, remove the conditional basis of such status, and cancel any outstanding order to show cause in accordance with §242.7 of 8 CFR chapter I. If the petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the Service.

(6) *Death of entrepreneur and effect on spouse and children.* If an entrepreneur dies during the prescribed two-year period of conditional permanent residence, the spouse and children of the entrepreneur will be eligible for removal of conditions if it can be demonstrated that the conditions set forth in paragraph (a)(4) of this section have been met.

(b) *Petition review—(1) Authority to waive interview.* The director of the service center shall review the Form I-829 and the supporting documents to determine whether to waive the interview required by the Act. If satisfied that the requirements set forth in paragraph (c)(1) of this section have been met, the service center director may waive the interview and approve the petition. If not so satisfied, then the service center director shall forward the petition to the district director having jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States so that an interview of the alien entrepreneur may be conducted. The direc-

tor must either waive the requirement for an interview and adjudicate the petition or arrange for an interview within 90 days of the date on which the petition was properly filed.

(2) *Location of interview.* Unless waived, an interview relating to the Form I-829 shall be conducted by an immigration examiner or other officer so designated by the district director at the district office that has jurisdiction over the location of the alien entrepreneur's commercial enterprise in the United States.

(3) *Termination of status for failure to appear for interview.* If the alien fails to appear for an interview in connection with the petition when requested by the Service, the alien's permanent resident status will be automatically terminated as of the second anniversary of the date on which the alien obtained permanent residence. The alien will be provided with written notification of the termination and the reasons therefore, and an order to show cause shall be issued placing the alien under deportation proceedings. The alien may seek review of the decision to terminate his or her status in such proceedings, but the burden shall be on the alien to establish by a preponderance of the evidence that he or she complied with the interview requirements. If the alien has failed to appear for a scheduled interview, he or she may submit a written request to the district director asking that the interview be rescheduled or that the interview be waived. That request should explain his or her failure to appear for the scheduled interview, and if a request for waiver of the interview, the reasons such waiver should be granted. If the district director determines that there is good cause for granting the request, the interview may be rescheduled or waived, as appropriate. If the district director waives the interview, he or she shall restore the alien's conditional permanent resident status, cancel any outstanding order to show cause in accordance with §1216.6(a)(5), and proceed to adjudicate the alien's petition. If the district director reschedules that alien's interview, he or she shall restore the alien's conditional permanent

resident status, and cancel any outstanding order to show cause in accordance with § 1216.6(a)(5). If the interview is rescheduled at the request of the alien, the Service shall not be required to conduct the interview within the 90-day period following the filing of the petition.

(c) *Adjudication of petition.* (1) The decision on the petition shall be made within 90 days of the date of filing or within 90 days of the interview, whichever is later. In adjudicating the petition, the director shall determine whether:

(i) A commercial enterprise was established by the alien;

(ii) The alien invested or was actively in the process of investing the requisite capital; and

(iii) The alien sustained the actions described in paragraphs (c)(1)(i) and (c)(1)(ii) of this section throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence.

(iv) The alien created or can be expected to create within a reasonable period of time ten full-time jobs to qualifying employees. In the case of a "troubled business" as defined in 8 CFR 204.6(j)(4)(ii), the alien maintained the number of existing employees at no less than the pre-investment level for the previous two years.

(2) If derogatory information is determined regarding any of these issues or it becomes known to the government that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs), the director shall offer the alien entrepreneur the opportunity to rebut such information. If the alien entrepreneur fails to overcome such derogatory information or evidence the investment funds were obtained through other than legal means, the director may deny the petition, terminate the alien's permanent resident status, and issue an order to show cause. If derogatory information not

relating to any of these issues is determined during the course of the interview, such information shall be forwarded to the investigations unit for appropriate action. If no unresolved derogatory information is determined relating to these issues, the petition shall be approved and the conditional basis of the alien's permanent resident status removed, regardless of any action taken or contemplated regarding other possible grounds for deportation.

(d) *Decision*—(1) *Approval.* If, after initial review or after the interview, the director approves the petition, he or she will remove the conditional basis of the alien's permanent resident status as of the second anniversary of the alien's entry as a conditional permanent resident. He or she shall provide written notice of the decision to the alien and shall require the alien to report to the appropriate district office for processing for a new Permanent Resident Card, Form I-551, at which time the alien shall surrender any Permanent Resident Card previously issued.

(2) *Denial.* If, after initial review or after the interview, the director denies the petition, he or she shall provide written notice to the alien of the decision and the reason(s) therefor, and shall issue an order to show cause why the alien should not be deported from the United States. The alien's lawful permanent resident status and that of his or her spouse and any children shall be terminated as of the date of the director's written decision. The alien shall also be instructed to surrender any Permanent Resident Card previously issued by the Service. No appeal shall lie from this decision; however, the alien may seek review of the decision in deportation proceedings. In deportation proceedings, the burden shall rest with the Service to establish by a preponderance of the evidence that the facts and information in the alien's petition for removal of conditions are not true and that the petition was properly denied.

[59 FR 26591, May 23, 1994, as amended at 63 FR 70315, Dec. 21, 1998]